



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 17, 2014

Dr. Kyle G. Heath
Mansfield Independent School District
605 East Broad Street
Mansfield, Texas 76063

OR2014-12405

Dear Dr. Heath:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 529574.

The Mansfield Independent School District (the "district") received a request for all documents received from proposers or bidders in reference to a certain request for proposals by the district, including materials marked "confidential" by the proposers. Although you take no position as to whether the requested information is excepted under the Act, you state release of this information may implicate the proprietary interests of GC Carter Construction Company, L.L.C., d/b/a Carter Construction Company ("Carter"), Hellas Construction, Inc. ("Hellas"), and Lee Lewis Construction, Inc. ("Lee Lewis"). Accordingly, you state, and provide documentation showing, you notified these parties of the request for information and of their right to submit arguments to this office as to why the information at issue should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have received comments from the Carter and Hellas. We have considered the submitted comments and reviewed the submitted information.

Initially, we note you have only submitted information that was marked "confidential" by the proposers. Therefore, to the extent any other information responsive to the request existed at the time the district received the request, we assume the district has released it to the requestor. *See* Open Records Decision No. 664 (2000) (if governmental body concludes that

no exceptions apply to requested information, it must release information as soon as possible). If the district has not released any such information, it must do so at this time. *See* Gov't Code §§ 552.301(a), .302.

Next, we note an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See id.* § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from Lee Lewis. Thus, we find Lee Lewis has failed to demonstrate it has a protected proprietary interest in any of the submitted information. *See id.* § 552.110(a)-(b); Open Records Decision Nos. 661 at 5-6 (1990) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, release of requested information would cause party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case information is trade secret), 542 at 3. Accordingly, the district may not withhold any of the submitted information on the basis of any proprietary interest Lee Lewis may have in it.

Carter and Hellas claim portions of their information are excepted from disclosure under section 552.110 of the Government Code. Section 552.110 protects (1) trade secrets, and (2) commercial or financial information, the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov't Code § 552.110(a)-(b). Section 552.110(a) protects trade secrets obtained from a person that are privileged or confidential by statute or judicial decision. *Id.* § 552.110(a). The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts, which holds a trade secret to be:

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the

Restatement's list of six trade secret factors.¹ RESTATEMENT OF TORTS § 757 cmt. b. This office must accept a claim information subject to the Act is excepted as a trade secret if a *prima facie* case for the exception is made and no argument is submitted that rebuts the claim as a matter of law. *See* ORD 552 at 5. However, we cannot conclude section 552.110(a) is applicable unless it has been shown the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. Open Records Decision No. 402 (1983).

Section 552.110(b) of the Government Code protects “[c]ommercial or financial information for which it is demonstrated based on specific factual evidence disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]” Gov’t Code § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, substantial competitive injury would likely result from release of the information at issue. *Id.*; *see also* ORD 661 at 5.

Carter and Hellas claim portions of their information consist of commercial information, the release of which would cause substantial competitive harm under section 552.110(b) of the Government Code. Carter and Hellas argue that disclosure of their financial information would give their competitors insight into their financial positions and knowledge of this information would be detrimental to their competitive positions. Carter and Hellas assert that release of their information at issue could influence pricing and market strategies of their competitors. Further, Carter and Hellas explain the industry in which they compete is a small subset of the construction industry and consists of only a few companies, which compete for the same bids. Upon review, we find these parties have made the specific factual or evidentiary showing required by section 552.110(b) that release of their information at issue would cause them substantial competitive harm. *See* ORD 661 (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence substantial competitive injury would result from release

¹The Restatement of Torts lists the following six factors as indicia of whether information constitutes a trade secret:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and other involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b; *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

of particular information at issue). Accordingly, the district must withhold the information we have marked under section 552.110(b) of the Government Code.²

We note some of the remaining information is subject to section 552.136 of the Government Code.³ Section 552.136 states “[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136(b); *see id.* § 552.136(a) (defining “access device”). Upon review, we find the district must withhold the account numbers we have marked under section 552.136 of the Government Code.

In summary, the district must withhold the information we have marked under section 552.110(b) of the Government Code. The district must also withhold the account numbers we have marked under section 552.136 of the Government Code. The district must release the remaining information.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml, or call the Office of the Attorney General’s Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Miriam A. Khalifa
Assistant Attorney General
Open Records Division

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²As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

³The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Ref: ID# 529574

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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